

RICHARD MOONEY
Holme Roberts & Owen, LLP
560 Mission Street, #2500
San Francisco, CA 94105
Telephone: (415) 268-2000
Facsimile: (415) 268-1999

Attorney for Plaintiffs

MATTHEW J. MCKEOWN
Acting Assistant Attorney General
Environment and Natural Resources Division

MEREDITH L. FLAX, Trial Attorney (DCBN 468016)
Wildlife & Marine Resources Section
United States Department of Justice
Environment & Natural Resources Division
P. O. Box 7369
Washington, D.C. 20044-7369
Telephone No: (202) 305-0404
Facsimile No: (202) 305-0275
meredith.flax@usdoj.gov

SCOTT N. SCHOOLS (SCSBN 9990)
United States Attorney
CHARLES M. O'CONNOR (SBN 56320)
Assistant United States Attorney
Environment & Natural Resources Unit
450 Golden Gate Avenue, Box 36055
San Francisco, California 94102
Telephone No: (415) 436-7180
Facsimile No: (415) 436-6748

Attorneys for Defendants

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

EARTH ISLAND INSTITUTE, et al.,

Plaintiffs,

v.

DONALD EVANS et al.,

Defendants.

Case No. C 03-0007 THE

Honorable Thelton E.
Henderson

**STIPULATION AND
ORDER REGARDING
SETTLEMENT OF
ATTORNEYS' FEES, COSTS
AND EXPENSES**

1 Plaintiffs, Earth Island Institute, the Humane Society of the United States, the American
 2 Society for the Prevention of Cruelty to Animals, Defenders of Wildlife, Animal Fund, the Oceanic
 3 Society, International Wildlife Coalition, the Animal Welfare Institute, the Society for Animal
 4 Protective Legislation, and Samuel F. LaBudde, and Defendants, Carlos Gutierrez, the Secretary of
 5 Commerce,^{1/} and William Hogarth, Assistant Administrator for NOAA's National Marine Fisheries
 6 Service, hereby stipulate and agree as follows:

7 WHEREAS, on December 31, 2002, Plaintiffs filed a complaint challenging Defendant's Final
 8 Finding under the International Dolphin Conservation Program Act (IDCPA), 16 U.S.C. section
 9 1385(g), that "intentional deployment on or encirclement of dolphins with purse seine nets is not
 10 having a significant adverse effect on any depleted dolphin stock in the Eastern Tropical Pacific
 11 Ocean" as invalid under the Administrative Procedure Act (APA), 5 U.S.C. section 706(2);

12 WHEREAS, by order entered August 9, 2004 and judgment entered August 10, 2004, the
 13 Court granted Plaintiffs' Motion for Summary Judgment and denied Defendants' Motion for
 14 Summary Judgment in the above-captioned case;

15 WHEREAS, Defendants filed a notice of appeal on October 6, 2004 and have since pursued
 16 that appeal in the Ninth Circuit;

17 WHEREAS, on October 13, 2004, Plaintiffs submitted an Application for Attorneys' Fees,
 18 Costs and Expenses Under the Equal Access to Justice Act in the above-captioned case;

19 WHEREAS, on November 9, 2004, the Defendants moved the Court to stay proceedings on
 20 Plaintiffs' application for attorneys' fees, costs and expenses pending the outcome of any appeal by
 21 Defendants;

22 WHEREAS, on December 16, 2004, the Court entered Defendants' request for a stay, noting
 23 the parties' intention to seek to settle the application for attorneys' fees, costs and expenses pending
 24 the outcome of any appeal;

25
 26 ^{1/} Pursuant to Fed. R. Civ. P. 25(d)(1), defendants hereby substitute Carlos Gutierrez, the current
 Secretary of Commerce, for Donald Evans, who resigned as Secretary of Commerce during the
 pendency of this litigation.

1 WHEREAS, the parties agree that it is in the interest of the parties and judicial economy to
2 settle the Plaintiffs' application for attorneys' fees, costs and expenses without protracted litigation
3 on a conditional basis; and

4 WHEREAS, the parties enter this Stipulation Regarding Settlement of Attorneys' Fees, Costs
5 and Expenses ("Stipulation") without any admission of fact or law, or waiver of any claims or
6 defenses, factual or legal.

7 NOW, THEREFORE, IT IS STIPULATED BY AND BETWEEN THE PARTIES AS
8 FOLLOWS:

9 1. Defendants agree to settle all Plaintiffs' claims for attorneys' fees, costs and expenses in
10 the District Court litigation in the above-captioned case for a total of \$1,000,000.00 but only upon a
11 ruling by the Ninth Circuit Court of Appeals on the appeal of the Court's order that is adverse to
12 Defendants. By "a ruling [. . .] that is adverse to Defendants," the parties mean a decision by the
13 Ninth Circuit that upholds the Court's determination that the Final Finding was arbitrary, capricious,
14 an abuse of discretion, or otherwise not in accordance with law. Defendants will not be liable for
15 payments of any attorneys' fees, costs or expenses under this Stipulation if the Ninth Circuit reverses
16 or vacates the Court's determination as to the validity of the Final Finding under the APA.

17 2. Any payment would be made in two equal installments of \$500,000.00.

18 3. Payment of the first installment would be due 30 days from the issuance of a mandate by
19 the Ninth Circuit on a ruling that is adverse to Defendants pursuant to Fed R. App. P. 41.

20 4. Payment of the second installment would be due by November 30th of the next official
21 United States Government Fiscal Year (i.e. October 1-September 30) ("Fiscal Year") following the
22 Fiscal Year when payment for the first installment is due.

23 5. All payments would be made by electronic funds transfer to Holme Roberts & Owen, LLP,
24 560 Mission Street, #2500, San Francisco, California 94105.

25 6. Plaintiffs agree to provide all information necessary for Defendants to process any
26 disbursements (including the payee's tax identification number and a complete and accurate NOAA

1 Vendor Profile Form for electronic funds transfers), no later than 10 days after issuance of a mandate
2 by the Ninth Circuit on a ruling that is adverse to Defendants pursuant to Fed. R. App. P. 41.

3 7. Defendants agree to submit all necessary paperwork to ensure payment is made in the time
4 periods set forth above.

5 8. If the events referred to in paragraph 3 occur on or after September 1 but before September
6 30 of any year, Defendants will make best efforts to make the first installment payment in less than
7 30 days from the issuance of a mandate described in paragraph 3 so that the first installment would
8 be paid prior to the end of that Fiscal Year. However, Defendants' failure to pay the first installment
9 in less than 30 days shall not constitute a violation of this Stipulation nor entitle Plaintiffs to any
10 additional relief under this Stipulation or otherwise.

11 9. Plaintiffs agree to accept payment of \$1,000,000.00 in full satisfaction of any and all claims
12 for attorneys' fees, costs and expenses to which Plaintiffs may be entitled from Defendants for work
13 performed in the above-captioned litigation in the District Court through and including the date of this
14 Stipulation, and any work associated with third-parties' attempted intervention in the above-captioned
15 litigation in District Court or the Ninth Circuit. By so agreeing, Defendants in no way acknowledge
16 they would be liable for attorneys' fees, costs and expenses associated with third-parties' attempted
17 intervention in the above-captioned case either in District Court or the Ninth Circuit.

18 10. Defendants' payment does not cover nor relate in any way to attorneys' fees, costs and
19 expenses that Plaintiffs may incur regarding any appeal by Defendants of the Court's order or any
20 other subsequent litigation in this matter. The parties agree that this Stipulation is without prejudice
21 to Plaintiffs' rights to seek any attorneys' fees, costs and expenses related to any appeal by Defendants
22 of the Court's order, or any other subsequent litigation in this matter. Defendants reserve all
23 arguments and defenses with respect to any such future application for attorneys' fees, costs and
24 expenses incurred by Plaintiffs in any appeal.

25 11. By this Stipulation, Defendants do not waive any right to contest attorneys' fees claimed
26 by Plaintiffs or Plaintiffs' counsel, including the hourly rate, in any future litigation. Further, this
Stipulation has no precedential value and shall not be used as evidence in any other attorneys' fees

1 litigation.

2 12. In view of this stipulation, Plaintiffs and Defendants hereby stipulate to the dismissal with
3 prejudice of Plaintiffs' Application for Attorneys' Fees, Costs and Expenses Under the Equal Access
4 to Justice Act in the above-captioned case.

5 Counsel for Defendants files this stipulation and attests, in accordance with General Order 45,
6 X.B., that concurrence in the filing of this document has been obtained from counsel for Plaintiffs,
7 Richard Mooney, and that this concurrence shall serve in lieu of his signature.

8 Dated: April 27, 2007

Respectfully submitted,

9
10 /s/ Richard Mooney per his authorization

RICHARD MOONEY

11 Holme Roberts & Owen, LLP
12 560 Mission St., #2500
13 San Francisco, CA 94105
Telephone: (415) 268-2000
Facsimile: (415) 268-1999

14 Attorneys for Plaintiffs

15 MATTHEW J. MCKEOWN

16 Acting Assistant Attorney General
Environment and Natural Resources Division

17 /s/ Meredith L. Flax

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Wildlife & Marine Resources Section
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Environment & Natural Resources Division
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Washington, D.C. 20044-7369
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Telephone No: (415) 436-7180
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Attorneys for Defendants

1 In view of the above stipulation, Plaintiffs' Application for Attorneys' Fees, Costs and
2 Expenses Under the Equal Access to Justice Act in the above-captioned case is hereby dismissed.

3 IT IS SO ORDERED.

4 05/01/07

5 Date

THELTON E. HENDERSON
United States District Judge

